SUPREME COURT, U.S.
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No. 96-1345

In The

# Supreme Court of the United States

October Term, 1996

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

*Petitioner,*

v.

LINDA ELDREDGE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of the opinion of the Ninth Circuit in this case, reported at 94 F.3d 1366 (9th Cir. 1996).

For the convenience of the Court, the published opinions in this case will be designated herein as *Eldredge I*, *Eldredge II*, *Eldredge IV*, *Eldredge V*, and *Eldredge VI*, as they are in the Petition, at 1-2. Opinions will be cited both to the West reporter and to Petitioner's Appendix at the appropriate page.

## STATEMENT OF THE CASE

The Petition contains several critical misstatements. These are corrected below. In addition, set out below are matters on which Respondents rely which are not included in the Petition.

### Correction Of Misstatements In Petition

Petitioner provided a misleading description of this case when it stated that the suit alleges "that the JATC, by permitting employers to select their own beginning apprentices, had engaged in a discriminatory employment practice that had a disparate impact upon female applicants." Petition (Pet.), p.3. In fact, Respondents challenge a JATC admission procedure, the "hunting license system," which has had a disparate impact on the admission of women applicants to the JATC carpentry apprenticeship program.[1]

The Ninth Circuit's 1981 ruling in *Eldredge II* was misstated in the Petition at page 14; the Court did not assert that the employers had "legally surrendered the right to select their own beginning apprentices." Rather, the Circuit Court

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[1] The case was brought under 42 U.S.C. § 2000e-2(d), which makes it an "unlawful employment practice" for a "joint labor management committee controlling apprenticeship" to discriminate on the basis of sex in admission to an apprenticeship program.

found that the employers had ceded whatever legally protectible interest they may have had in "selecting apprentices to be trained" [in the JATC carpentry apprenticeship program]. *Eldredge II*, 662 F.2d at 538, Pet., 36a. No employer has ceded to the JATC its right to select which beginning apprentice(s) it will hire and no court has ruled that this right has been ceded.

Petitioner has also misrepresented the Ninth Circuit's 1987 liability holding, when it described it as follows: "The Court of Appeals further held that the first-job requirement had a disparate impact upon female applicants and that its use was not a business necessity." Pet., p. 7. The Ninth Circuit did not hold that the first job requirement caused the disparate impact or that its use was not a business necessity. Rather, the Court of Appeals ruled:

> To the extent that women and men are admitted into the apprenticeship program at different rates, it is not contested that the differential results from use of the "hunting license" system and not from some other element of the admission process. The JATC attempts to explain why the "hunting license" system has this effect but does not dispute the existence of the effect. [Footnote omitted].

*Eldredge IV*, 833 F.2d at 1338, Pet., 22a. The Court's explicit ruling on "business necessity" was the following:

> Even if we assume that requiring apprentices to have a job in the industry is a business necessity . . . the JATC has neither argued nor produced evidence that that use of the "hunting license" system to satisfy the first-job requirement is itself a business necessity. [Footnote omitted].

*Id.* at 1340, Pet., 26a. In *Eldredge IV* the Ninth Circuit remanded the case "for entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the hunting license system. . . . " *Id.* at 1341, Pet., 28a.

Similarly, the Petition, p. 8, incorrectly stated the terms of the affirmative action referral plan mandated by the Ninth

Circuit in 1996, when it described the plan as follows: "Until 20% of the participants in the program were women, the court held that 20% of newly hired beginning apprentices would have to be women." In fact, the Ninth Circuit's ruling did not require the JATC to insure that any applicants, male or female, were hired. Rather, the JATC meets its obligation by dispatching applicants from its new applicant referral lists as follows:

> Under this plan, at least one out of every five applicants dispatched under the referral list must be a woman. If the first four applicants on the list are men, the next dispatch must be the highest listed female applicant. If there is no female applicant listed, the JATC must undertake affirmative efforts to encourage women to apply. The plan terminates when 20% of the apprentices are women.

*Eldredge VI*, 94 F.3d at 1370, Pet., 8a-9a.

Finally, the Petition has mischaracterized the obligations placed on the JATC by the January 17, 1997 district court interim order implementing relief. By using the words "hired" and "hires" instead of the words used in the order, which are "referred" and "referrals," Petitioner gives the misleading impression that it has been ordered to take on the "hiring" of applicants, rather than the "referring" of applicants.[2]

For example, Petitioner makes critical misstatements concerning the terms of the order when it describes the referral system as follows:

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[2] Under the terms of the Interim Order Implementing Relief (Petition, 41a) a "referral" is a step that occurs prior to any hiring. It is defined in the order as follows:

> 9. A "referral" is defined herein as the referral of one applicant to a Union, which has placed an order for one or more applicants. A referral occurs when the JATC communicates the referral to an applicant and the applicant agrees to accept the referral. Upon dispatch to a subscribing employer by the Union, and upon hire by the subscribing employer, the applicant shall be indentured as an apprentice.

> The JATC will refer the applicant who has waited longest on the applicant list unless the four previous applicants hired have been men. If the four most recent hires have been men, the JATC will refer the next female applicant on the applicant list.

Pet., p.9. In fact, the Interim Order Implementing Relief, in pertinent part, states the following:

> 10. The first four referrals on each new applicant referral list shall be offered by the JATC to applicants in the order of their numerical sequence listing on that new applicant referral list.
>
> 11. In the event that at least one of the first four referrals results in a woman being referred the fifth referral shall, also, be offered by the JATC to applicants in the order of their numerical sequence listing on that new applicant referral list.
>
> 12. In the event that none of the first four referrals results in a woman being referred the fifth referral shall be offered by the JATC to the woman whose name appears next in numerical sequence listing on that new applicant referral list; if that woman for any reason does not accept the referral, the referral shall continue to be offered in numerical sequence to the next woman on that referral list until a woman accepts the referral or until each woman on that referral list has refused to accept the referral.

Pet., 41a-42a. Whether or not any of the male applicants who are referred, are also "hired," is irrelevant to the JATC's obligations.

The Petition also erroneously describes the JATC's obligations by the following, "If the first female applicant referred is not hired, the JATC will continue to refer female applicants until one is hired." Pet., p.9. In fact, in any group of five applicants referred, if a woman is among the first four referred and that woman is not hired, the JATC has no further affirmative action referral obligations within that group. However, when a woman is referred under paragraph 12 of

the order (the special "affirmative action" referral), if that woman notifies the JATC that she was not hired, the JATC will continue to offer that particular individual a referral until she is hired. If that woman refuses a subsequent referral, the JATC will continue offering referrals to a woman until a woman accepts a referral. Pet., 42a, ¶¶ 12 and 15.

**Pertinent Facts That Were Not Included In The Petition**

The JATC is a joint labor management committee comprised of equal numbers of employer representatives and of union representatives. Employers and local unions that are signatories to the Carpenters 46 Northern California Counties Master Agreement ("Master Agreement") are bound by the JATC's construction of the Trust Agreement. *Eldredge I*, 440 F. Supp. at 510-11, Pet., 98a-99a; Clerk's Record ("CR")-36, Exhibit 10 thereto, ¶ 4(1). The trust fund agreement grants full authority to the JATC to structure its apprenticeship program and to select the apprentices. *Eldredge IV*, 833 F.2d at 1335, Pet., 15a.

Under the JATC's uniform selection procedures, from 1974 through the 1991 remedy trial, applicants who met minimal age and educational requirements were listed by the JATC on a JATC new applicant referral list. To gain admission to the apprenticeship program, applicants were required to obtain a job with a signatory employer. *Eldredge I*, 440 F. Supp. at 511-12, Pet., 98a-102a; *Eldredge V*, Pet., 61a-62a.

The JATC authorized two methods for an applicant to obtain the requisite first job. Under one method, the JATC would refer the applicant to the union for dispatch to a job in accordance with the applicant's numerical sequence listing on a JATC new applicant referral list. Under the other method (known as the "hunting license system"), a qualified applicant was provided a "hunting license" and told to hunt for an employer who would sign the letter of subscription, thereby agreeing to hire that applicant. *Id.*

Under either method, once the applicant obtained the requisite first job he or she was admitted (indentured) into the JATC apprenticeship program. For referrals to subsequent

jobs the (now) indentured apprentice used the union's out-of-work list. *Eldredge IV*, 833 F.2d at 1341, fn. 12, Pet., 28a; *Eldredge I*, 440 F. Supp. at 511-512, Pet., 101a.

In 1979, the district court dismissed the case under Rule 19(b), Federal Rules of Civil Procedure, finding that signatory employers (4,500 of them) were "indispensable parties" and that the employers were, as a practical matter, too numerous to be joined. *Eldredge I*, 440 F. Supp. at 526-27, Pet., 131a-132a; *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 83 F.R.D. at 140, Pet., 93a. The Ninth Circuit reversed the dismissal in 1981. *Eldredge II*, Pet., 87a.

In 1985, the parties filed cross-motions for summary judgment. In its motion for summary judgment the JATC claimed it could not be held liable for employer discrimination and, at the same time, introduced a study directed at proving that the contractors do not discriminate against women.[3] The JATC's study concluded that a significant reason that men were more successful than women in obtaining jobs through the hunting license was that men "were referred to their first job by a friend or family member." *Eldredge IV*, 833 F.2d at 1339, n.6, Pet., 22a. The defense motion for summary judgment was granted.

Respondents' class appealed. The Ninth Circuit reversed and remanded the case "for entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the 'hunting license' system and for trial to determine the appropriate remedy." *Eldredge IV*, 833 F.2d at 1341, Pet., 28a.

On May 9, 1991, days before the remedy trial commenced, the parties entered a consent decree based explicitly on the Ninth Circuit's 1987 determination of JATC liability in *Eldredge IV*. The consent decree established a back pay fund

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[3] Respondents moved for summary judgment on liability, based on the disparate impact of the hunting license system on women's rate of admission. No evidence was submitted that any employer had discriminatorily refused to hire any woman.

from which back pay was paid to respondents' class. It also settled the issue of respondent's attorneys' fees from the inception of the litigation in 1975 through May 9, 1991. CR-360. The consent decree reserved two issues for court determination, with each party reserving appeal rights as to those two issues. The issues were the determination of injunctive relief and of Respondents' attorney's fees for legal work done after May 9, 1991.[4] CR-360, page 6. The consent decree was finally approved by the district court on September 26, 1991. CR-370.

Statistics introduced at the 1991 remedy trial showed that the admission rate of women applicants had further declined in the period 1985 through 1990 from what it had been in the period 1976 through 1984. In the earlier period women applicants' admission rate had been 54 percent of the male applicants' admission rate; in the period 1985 through 1990, women's admission rate had declined to 48 percent of the men's admission rate. *Eldredge IV*, 94 F.3d at 1368, Pet., 3a.

Both Respondents' class and Petitioner proposed affirmative action remedies. The JATC's proposal was to permanently install a two-track admission system; one for men and one for women. Under the proposal male applicants would continue to enter the apprenticeship program with a job. Women would no longer be required to obtain a job to gain admission. Instead, all women applicants who met the JATC's minimal age and educational requirements would simply be admitted upon signing the applicant register. After the remedy trial ended the JATC unilaterally instituted its two-track indenture system. *Eldredge V*, Pet., 67a-68a, *Eldredge VI*, 94 F.3d at 1369, Pet., 5a.

At the remedy trial, Respondents' proposed remedy was that the JATC be enjoined from using the hunting license system, that the JATC be ordered to rely solely on the already-existing new applicant referral list system and that an affirmative action referral plan be instituted. Under the plan,

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[4] The consent decree did not reserve for further litigation the issue of whether absent employers are parties that should be joined under Rule 19.

the JATC would offer at least one in every five referrals to a woman JATC applicant. The affirmative action referral system would continue until women comprised 20 percent of the apprentices in the JATC program.[5] *Id.*, 94 F.3d at 1368-69, Pet., 11a-12a.[6]

In 1993 the district court issued an injunction which adopted the JATC's affirmative action remedy. *Eldredge VI*, 94 F.3d at 1369, Pet., 5a. Respondents appealed. In 1996, the Ninth Circuit reversed the district court, finding that it had abused its discretion by ordering the two-track admission system. The Court's reasoning was that the district court's remedy was "not gender neutral," and was neither "necessary, narrowly tailored, nor effective to remedy discrimination."

> In fact, this two-track system would make matters worse.
>
> First it would bring women into the apprenticeship program without the most important tool they need to succeed: on-the-job training. Men, on the other hand, would be fully capable of taking advantage of the program's unique synthesis of classroom instruction and practical experience.

*Eldredge VI*, 94 F.3d at 1369, Pet., 6a. The Court went on to say that the district court's remedy would discourage the JATC from "seeking out and selecting female applicants, for the JATC receives most of its funding from employer contributions that are pegged to hours worked by employed apprentices." *Id.*

In addition, the Ninth Circuit ruled that the district court had abused its discretion by declining to enjoin the JATC from using the hunting license system, by declining to order the JATC to require all applicants to satisfy the first-job requirement by using the already-existing, gender-neutral

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[5] This 20% goal for women was supported by trial evidence which is discussed in section II.D. of Reasons for Denying Writ.

[6] Respondents also sought the appointment of a monitor, institution of a record-keeping system to keep track of the referral system, expanded recruitment efforts and other relief.

numerical referral list and by failing to order implementation of Respondents' proposed affirmative action referral plan. *Id.*, at 1369, 1370, Pet., 7a, and 8a.

## REASONS FOR DENYING WRIT

### I. THIS CASE POSES NO NEW OR UNRESOLVED QUESTION REGARDING THE APPLICATION OF RULE 19, FEDERAL RULES OF CIVIL PROCEDURE

The Petition for a writ of certiorari, on the question of joinder of parties under Rule 19, Federal Rules of Civil Procedure, should be denied. Petitioner does not assert that there is a conflict among the Circuits concerning the application of Rule 19 and, indeed, there is none. This case presents no unresolved, significant legal issue and it turns on its unique facts and its complex twenty-two year history.

#### A. Complete Relief Can Be Accorded Respondents' Class Without Joinder Of The Employers

Rule 19(a)(1) requires joinder of persons in whose absence "complete relief cannot be accorded among those already parties." The Petition erroneously argues that, in the absence of the employers, complete relief cannot be accorded between Respondents and the JATC. According to Petitioner, the employers should be joined under Rule 19(a)(1). Petitioner's argument is faulty for three reasons. First, applicable legal precedent does not support it. Second, the relief awarded is complete because it restructures the JATC's admission process, removing that component which has had the disparate impact upon the admission of women. Third, the record contains no evidence that any employer has in the past or will in the future refuse to hire a woman apprentice because of her sex.

### 1. Applicable Legal Precedent Supports The Ninth Circuit

The Ninth Circuit's ruling that "complete relief," within the meaning of Rule 19(a)(1), could be accorded between the parties in this case is in agreement with a decision of the Sixth Circuit applying Rule 19 to a similar fact situation. In *Smith v. United Brotherhood of Carpenters and Joiners of America*, 685 F.2d 164, 166 (6th Cir. 1982), a Title VII race discrimination case, the Sixth Circuit reversed the district court which had dismissed the case under Rule 19 due to the absence of employers who were hiring through the union. The party defendants were the Carpenters union and its joint apprenticeship council. The Court held:

> Ideally, all four parties would be before the court. Yet Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded. *Sandobal v. Armour & Co.*, 429 F.2d 249 (8th Cir. 1970).

*Id.* at 166. Accord, *Local 670 v. Int'l Union, United Rubber, Cork, Linoleum and Plastic Workers of America*, 822 F.2d 613, 618 (6th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988).

In *Smith*, *supra*, the Sixth Circuit explained its ruling, further, as follows:

> Throughout this litigation, the union and the contractors have pointed to one another as the source of the low black employment in the trade. The unions have stated that they would welcome more black members but have been powerless to obtain them because the contractors have failed to hire blacks. Conversely, contractors have pointed to the union's entrance requirements and decried them as constraints on their efforts to hire qualified blacks. This litigation offered the opportunity to examine one half of that dilemma – the entrance requirements. If those requirements were discriminatory, then they

> might have been reformed within the context of this lawsuit as it stood before the District Court.

Obviously, the Ninth Circuit followed the same pragmatic approach in this case when it concluded that restructuring the JATC's entrance requirements could "effectively increase the participation of women in the apprenticeship program." *Eldredge II*, 662 F.2d at 538, Pet., 35a.

Petitioner cited only one appellate decision ordering dismissal of a case under Rule 19(a) on grounds that complete relief could not be accorded among the parties to the case. That case, *Leber v. Canal Zone Central Labor Union & Metal Tr. Council*, 383 F.2d 110 (5th Cir.), *cert. denied*, 389 U.S. 1046 (1967), involved wholly different facts and different legal considerations than the instant case. In *Leber* the plaintiffs sought to enjoin a lower federal government official from enforcing certain regulations promulgated by the Secretary of the Army which lowered the plaintiffs' pay. The Fifth Circuit found that, in the absence of action by the Secretary of the Army, the plaintiffs would be unable to obtain the pay they sought. In the instant case, however, enjoining the JATC from using the hunting license system (a system which was promulgated by the JATC alone) requires no action on the part of the employers.

### 2. The Relief Awarded Is Complete

The relief awarded herein is "complete" as between the JATC and Respondents; it removes from the JATC's admission process that component, the hunting license system, which has disparately impacted upon the admission of women. The relief restructures the method by which applicants to the JATC program obtain their first apprentice jobs. The restructuring, which replaces the hunting license system with numerical referral of applicants from JATC applicant referral lists, will provide access to beginning apprentice job openings to all JATC applicants.

The effect of women's lack of access to employers with current job openings for beginning apprentices was the subject of a JATC study. The JATC submitted the study to the

district court in 1985 in support of its summary judgment motion. The JATC study, directed at proving that contractors *do not* discriminate against women in their hiring practices, found that a significant reason that male applicants enjoyed greater success in obtaining jobs via the hunting license was that they "were referred to their first job by a friend or family member." *Eldredge IV*, 833 F.2d at 1339, n. 6, Pet., 22a. Obviously, replacement of the hunting license system with a system whereby all JATC applicants are referred by number to employers who currently have job openings for beginning apprentices will positively impact women's success rate in obtaining these jobs. As a result, women's rate of admission to the JATC's apprenticeship program will increase.

### 3. There Has Been No Showing That Complete Relief "Cannot" Be Accorded

Rule 19(a)(1) requires joinder only of those persons in whose absence complete relief "cannot" be accorded among those already parties. Petitioner speculates that employers may not hire women in the future and that, as a result, complete relief "cannot" be accorded herein. However, Petitioner's speculation is not borne out by the record.

There is no evidence that employers will refuse to hire women referred.[7] In 1981, the Ninth Circuit noted the lack of such evidence when it determined that the employers' joinder was not required by Rule 19. *Eldredge II*, 662 F.2d at 537, Pet., 35a. Today, despite the passage of an additional fifteen years, the record contains no evidence that the disparity in male/female admission rates was caused by any individual employer or employers practicing sex discrimination in hiring. In fact, Petitioner has frankly admitted, "No employer

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[7] The evidence is that employers have hired women apprentices. Although women applicants' admission rate under the hunting license system was far less than male applicants' admission rate, employers have hired women under the hunting license system.

has yet been found to have discriminated against a single job applicant."[8] Pet., p. 21.

#### 4. The Public Interests In "Complete Relief" Are Met

The Advisory Committee Notes to Rule 19(a) explain that, "The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." The public interest is served herein by allowing this case to proceed. If, in the future, a woman sues an individual employer alleging that the employer refused to hire her because of her sex, such a case would involve discreet and separate issues from the issue litigated in this case. This case was brought under 42 U.S.C. § 2000e-2(d), solely to redress sex discrimination in admission to an apprenticeship program.

### B. The Absent Employers' Ability To Protect Any Interest In This Matter Has Not Been Impaired

Rule 19(a)(2)(i) requires the joinder of any person who claims "an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest. . . . " Although the Petition recites the text of Rule 19(a)(2)(i), Petitioner has not argued that the employers' absence has impaired their "ability to protect" an interest they may have in the hunting license

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[8] The hunting license amounts to a word-of-mouth referral system. In 1977 there were approximately 4,500 subscribing employers. There is no way of knowing whether women applicants who were unable to obtain jobs ever applied to work for any employers who actually had openings for beginning apprentices. Male applicants to the JATC program were referred by friends or relatives to employers who had such openings. If women did not apply for these jobs, employers who did not hire women did not discriminate against them.

system.[9] In fact, the employers' ability to protect any presumed interest in the hunting license system has not "as a practical matter" been impaired or impeded. This is because the JATC has fought zealously and continuously for twenty-two years to protect that interest.

In *Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132 (1st Cir. 1989), the district court's dismissal of an action under Rule 19 was reversed, wherein a wholly-owned subsidiary had not been joined in the action. The First Circuit noted, *supra*, at 135, that the subsidiary's "interests in this case are virtually identical to those of Shearson [the defendant parent corporation]" and that, in order for Shearson to win the case, it will want to make the same factual showings and arguments as Subsidiary would wish to show. Further, the Court observed that any financial harm to the absent subsidiary would harm the party defendant as well. Finally, the First Circuit noted that "Shearson's counsel's motives and ability to defend *Shearson* do not differ significantly, as a practical matter, from Shearson's counsel's motives and ability to defend the *Subsidiary's* interests as well." The Court concluded that, under the circumstances, "we fail to see how proceeding without the Subsidiary would 'as a practical matter impair or impede' the Subsidiary's interests, interests that Shearson's counsel can adequately protect [citations omitted]." *Id.* at 135-36.

Much like the party defendant in *Pujol*, the JATC herein has substantially the same motives and ability to protect the hunting license system as do the absent employers. This is because half of the representatives who comprise the JATC are employer representatives and most of the JATC's funding derives from employer contributions. *Eldredge I*, 440 F. Supp. at 511, Pet., 98a-99a; *Eldredge VI*, 94 F.3d at 1369, Pet., 6a. The confluence of interests between the absent employers and the JATC is apparent; the JATC has fought ceaselessly for

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[9] The employers' presumed interest in the hunting license and the question of whether that interest has been prejudiced by the employers' absence is discussed, *infra*, at 1. of Section C.

twenty-two years to preserve the hunting license system. Moreover, it has done so by submitting evidence that the absent employers *have not* practiced any sex discrimination in their hiring.

In *Ferrofluidics v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1472 (1st Cir. 1992), the First Circuit found that an absent corporation was not a necessary party under Rule 19(a)(2)(i) "whose practical ability to protect an interest was at stake" when that corporation had made no attempt to intervene. "A party is not 'necessary' where it 'has not claimed an interest in outcome of the action.' " *Id.*

Similarly, the employers herein have not attempted to intervene, despite the fact that fifteen years ago, in *Eldredge II*, 662 F.2d at 538, Pet., 36a, the Ninth Circuit specifically invited employers or an employer organization, if they then believed they were affected by the litigation, to move to intervene. Yet, not a single employer or employer organization has ever attempted to do so. And there is no question but that employers have been aware of this litigation since its inception; employer representatives comprise half of the JATC. This is yet another strong indication that the employers themselves have not considered their ability to protect their interests in any way impaired or impeded by their absence from the litigation.

Finally, there has been no showing made that the employers' interests have not been adequately protected by the JATC. See *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) (denying intervention under Rule 24(a) where no showing was made that the interests of applicants for intervention were not adequately protected by defendant), *cert. denied*, 502 U.S. 1035.

It is clear that, "as a practical matter," the employers' ability to protect any interest they may claim in the hunting license system has not been impaired by their absence.

### C. The Absent Employers Are Not "Indispensable" Parties

The JATC's true purpose in raising the Rule 19(a) question is not to achieve joinder of the employers. At last count there were 4,500 individual signatory employers who, as a practical matter, could not be joined. *Eldredge II*, 662 F.2d at 535, Pet., 32a. Thus, it would appear to be Petitioner's strategy to obtain a dismissal of the case under Rule 19(b), governing "Determination by Court Whenever Joinder not Feasible." Rule 19(b) requires a court to decide whether "in equity and good conscience" a case should proceed in the absence of a Rule 19(a) party, or whether it should be dismissed and the absent party then termed "indispensable."

Rule 19(b), itself, sets forth four factors for a court to consider in making the determination of whether a case should be allowed to proceed among those already parties or whether it should be dismissed. The four factors are:

> . . . first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Rule 19(b), Federal Rules of Civil Procedure.

#### 1. Is The Judgment Prejudicial?

With respect to the first factor of Rule 19(b), which addresses potential prejudice, the fact that litigation may arguably have some adverse affect on an absent person, does not render that person an "indispensable" party. According to The Advisory Committee Notes to Rule 19:

> . . . an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party

> exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

In *Pujol v. Shearson/American Express*, *supra*, 877 F.2d at 138 (1st Cir. 1989), a district court's dismissal of an action under Rule 19(b) was reversed after an appellate court found that there was "no significant prejudice" to the absent Subsidiary. The fact that plaintiff was likely to introduce evidence of Subsidiary's wrongdoing did not render Subsidiary a Rule 19(a)(2)(i) party. *Id.* at 136.

Petitioner cites one district court Title VII case in which joinder of absent persons was required on grounds that a judgment issued in their absence would be prejudicial. In *Local Union No. 329, International Longshoremen's Ass'n v. South Atlantic and Gulf Coast District of International Longshoremen's Ass'n*, 295 F. Supp. 599, 602-03 (S.D. Tex. 1968), brought under Title VII to end racially segregated local unions, the district court found that two white-only locals were necessary parties. Any judgment rendering adequate relief for plaintiffs would require "substantial changes in [the locals'] membership and operations" and would "intimately affect the internal practices and perhaps the very existence of these locals."

It is obvious that the absent employers in the instant case have not been severely affected, as the court deemed the absent local unions would be in *Local Union No. 329*. Elimination of the hunting license system certainly does not affect the employers' "very existence."

In *Smith v. United Brotherhood of Carpenters and Joiners of America*, *supra*, 685 F.2d at 166, modification of the entrance requirements to the Carpenters union and to its training programs so as to remove racially discriminatory entrance criteria was held not to have impaired the interests of the absent employers; "The interests of the absent employers would not have been impaired so long as any

modified entrance requirements did not deny them an adequate supply of willing carpenter apprentices." *Id.* Similarly, in the instant case, the employers' interests will not be impaired. The employers will continue to have an adequate supply of willing carpenter apprentices after the hunting license system has been replaced by the JATC's already-existing numerical referral list system.

The Petition, at p. 10, incorrectly characterizes the end of the hunting license system as "radically" altering "the employers' current hiring practices." In fact, the court restructuring will end only one of the JATC's authorized methods for applicants to obtain their first jobs – the discriminatory hunting license system. The other authorized system, numerical referral from JATC applicant lists, will continue.

Moreover, the hunting license system is not an employer contractual right and it is not a tenet of the collective bargaining agreement. Relief ordered by the court, including replacement of the hunting license system with the JATC's numerical referral system, is all within the purview of the JATC's powers under the trust agreement. The trust agreement gives the JATC "the authority to select persons to refer to the employers." Pet., p. 14, quoting from dissent of then Justice Rehnquist, citing *Eldredge I*, 440 F. Supp at 510-512, 83 F.R.D. at 137.

Moreover, the absent employers, as signatories to a collective bargaining agreement, have never enjoyed unfettered discretion in their hiring practices. The Master Agreement sets forth in detail the hiring procedures, working conditions, pay scales and benefits that employers must provide for admitted apprentices and journeymen. Pl. Trial Exhibit No. 3. The right employers have enjoyed, and still enjoy, is an unfettered right under the collective bargaining agreement to reject any person referred, whether the referral is from the JATC new applicant referral list or from the union out-of-work list. Pet., pp. 4, 10, and 14.

There is no injunction whatsoever against the employers.[10] Pet., p. 10. Nor are the employers required by the court ordered relief to hire any women whatsoever. There is no 20 percent hiring goal imposed on any employer. The JATC alone is obligated by the affirmative action provisions of the relief. Out of every group of five persons referred by the JATC from a new applicant referral list at least one is to be a woman. Under the affirmative action referral procedure, if an employer makes a request for the referral of less than four beginning apprentices, it may be that none of the JATC applicants referred is female. In fact, in a single season, an employer who hires only a handful of beginning apprentices may find that no women have been referred at all.

### 2. Can Prejudice Be Lessened Or Avoided?

The second factor specified by Rule 19 is the extent to which "by protective provisions in the judgment, by the shaping of relief, or other measures" prejudice can be avoided. In fact, in 1981, when it held that the employers were not Rule 19 parties, the Ninth Circuit cautioned, " . . . without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority of the JATC under the trust fund agreement." *Eldredge II*, 662 F.2d at 538, Pet., 36a.

The relief ordered by the court is within the purview of the JATC's authority under the trust agreement. Moreover, through negotiation, the district court order implementing relief has been shaped so as to avoid creating any conflict for those employers who are subject to municipal local hire agreements. Pet., p. 9. There has been no suggestion that any additional aspect of the order implementing relief needs reshaping to avoid possible prejudice to the employers.

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[10] Petitioner, at page 10, correctly stated, "The order requires no affirmative action by employers to hire more women. . . . " At page 16, however, it misstates the relief awarded, asserting "employers as a class must now adopt a 20 percent hiring quota." In fact, no hiring goals have been imposed on any employer.

### 3. Is The Judgment Adequate?

The third aspect of Rule 19(b) requires courts to consider whether the judgment rendered in the person's absence will be "adequate." Of this third Rule 19(b) criterion, Justice Harlan, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968), wrote for a unanimous Court,

> We read the Rule's third criterion, whether the judgment issued in the absence of the non-joined person will be "adequate," to refer to the public stake in settling disputes by wholes, whenever possible . . . .

The Justice continued, "After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent." *Id.*

There has been a very considerable expenditure of time and expense in this case since the original Rule 19 motion was made in the late 1970's. After the Ninth Circuit determined in 1981 that the employers were not Rule 19 parties a second appeal ensued which in 1987 determined the JATC's liability. In 1991 the parties entered a consent decree settling the issues of back pay for respondents' class and respondents' attorney's fees through the date of the consent decree.[11] Also, in 1991 a six-day remedy trial was held. In 1993, following on the remedy trial, an injunction was issued. Further, a third appeal resulted in 1996 in the reversal of the district court's injunctive relief and in the issuance of a mandate to the district court requiring it to order implementation of specific items of relief. Finally, in 1997, the district court issued an order implementing that relief.

It would be wholly inefficient and contrary to the public interest to dismiss the case at this juncture. *Id.* Moreover, the

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[11] Although the consent decree reserved two issues for court determination, the Rule 19 joinder issue was not reserved. The JATC, by raising the issue now, is essentially seeking to modify the terms of the Consent Decree. However, a party seeking to modify a consent decree may need to show initially a "significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). This the JATC has not done.

original Rule 19 motion was made prior to a determination of liability, and the equities in this case have changed dramatically since then. At this juncture, the employers cannot be deemed "indispensable" parties. See *Bank of America v. Hotel Rittenhouse Associates*, 844 F.2d 1050, 1054 (3rd Cir. 1988) ("Even assuming" that the absent person "is a Rule 19(a) necessary party," it would not be deemed an "indispensable party"; since the original Rule 19 motion was made, the equities had changed – liability had now been determined and the only issue left was "enforcement of the award").

**4. Is There An Adequate Remedy?**

The fourth Rule 19(b) factor requires the court to determine whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. In the present case, wherein the employers are too numerous to join, there is no other forum or remedy available to plaintiffs. Moreover, even when there exists a hypothetical alternative state court forum (which clearly there does not in the instant case), a Rule 19(b) dismissal should not be affected after a trial:

> After trial . . . [plaintiffs'] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage. . . . when plaintiffs' only concern was for a federal rather than a state forum.

*Provident Tradesmens Bank*, *supra* at 112. In the present case, as in *Provident Tradesmens Bank* "opposing considerations" are truly "hard to find." *Id.*

There is no alternative forum in which 4,500 individual subscribing employers can be joined. Dismissal of this case, under these circumstances, would amount to a nullification of that provision of Title VII which makes it an "unlawful employment practice" for a "joint labor-management committee controlling apprenticeship" to discriminate against any

individual on the basis of sex in admission to an apprenticeship program. 42 U.S.C. § 2000e-2(d). This compelling factor, in and of itself, dictates against a finding that the employers are "indispensable." See *id.* at 119.

Finally, the same can be said of the JATC as was said of a party defendant in *Provident Tradesmens Bank*, *supra* at 112: "Its only concern with the absence . . . [of employers] was and is to obtain a windfall escape from its defeat. . . . "

## II. THIS CASE POSES NO NEW OR UNRESOLVED QUESTION REGARDING AFFIRMATIVE ACTION OR AFFIRMATIVE ACTION NUMERICAL GOALS

The Petition for a Writ of Certiorari should be denied on the issue of whether an affirmation action referral plan for women, coupled with a 20 percent women's participation goal, was appropriately ordered in this case. The 20 percent affirmative action goal and the plan itself complies fully with established precedent of this Court. Petitioner asserts no conflict among the circuit courts with respect to these issues and, indeed, there is none.

Petitioner does not have standing to complain that an affirmative action remedy is not warranted in this case because Petitioner, itself, requested imposition of such a remedy.

### A. The Circumstances Of This Case Warranted Imposition Of An Affirmative Action Remedy

This Court has held that in appropriate circumstances, affirmative race-conscious relief may be ordered as a remedy for past discrimination. In *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986), the plurality concluded that numerical goals may be ordered "where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 445 (plurality opinion by J. Brennan, joined by J. Marshall, J. Blackmun and J. Stevens). In a concurring opinion, Justice Powell

wrote that a "numerical goal" may be imposed as a remedy "in cases involving particularly egregious conduct." *Id.* at 483-84. These "remedies properly are confined to the elimination of proven discrimination." *Id.* at 487 (concurring opinion by J. Powell).

In the instant case, both Petitioner and Respondents recognized that the circumstances herein warranted imposition of an affirmative action remedy, and both Petitioner and Respondents sought such a remedy at the 1991 remedy trial. Clearly, Petitioner does not have standing now to assert that the Ninth Circuit erred in ordering implementation of an affirmative action remedy.

During and after the 1991 remedy trial Petitioner proposed to the district court that it adopt as relief the gender-specific admission systems which the JATC had unilaterally implemented shortly after the trial ended. The district court acceded to the Petitioner's proposal and ordered that 100 percent of the qualified women applicants to the JATC's apprenticeship program (those who met the JATC's minimal age and education requirements) be admitted simply by signing a JATC applicant register. *Eldredge V*, Pet., 69a. By contrast, qualified male applicants were admitted only after they secured a first-job either through the hunting license system or by obtaining a numerical referral from a JATC applicant referral list. The order would continue a gender-specific admission systems permanently.

The Ninth Circuit correctly ruled in 1996 that the particular "facially discriminatory" affirmative action remedy adopted by the district court was an abuse discretion because it was "neither necessary, narrowly tailored, nor effective to remedy discrimination." *Eldredge VI*, 94 F.3d at 1369, Pet., 5a. The Court recognized that the remedy imposed would not alleviate discrimination against women:

> . . . this two-track system would make matters worse. First, it would bring women into the apprenticeship program without the most important tool they need to succeed, on-the-job training. Men, on the other hand, would be fully capable of taking

> advantage of the program's unique synthesis of classroom instruction and practical experience.

*Id.*, Pet., 6a.

Instead, the Court mandated the district court to order the following specific items of relief: eliminate the hunting license system, require all applicants to use the gender-neutral already existing JATC sequential referral list to satisfy the first-job requirement, and impose a temporary 20 percent female affirmative action referral goal. *Id.*, 94 F.3d at 1372, Pet., 13a.

The Ninth Circuit explained why affirmative action was necessary in this case:

> Given the JATC's decades-long history of recalcitrance and foot-dragging, it is highly unlikely that the JATC will facilitate or even permit the entry of women into the apprenticeship program on equal footing with men without clear numerical goals. Moreover, as a direct result of the JATC's long-term use of the hunting license system, women have had far less than an equal opportunity to enter the carpentry trade. This discrimination is probably the leading reason why women make up only 5% of the JATC's current applicant pool.

*Id.*, 94 F.3d at 1371, Pet., 11a.

The Ninth Circuit further found that the conduct of the JATC was "egregious and obstinate":

> In the face of the blatantly obvious [discriminatory] effects of the hunting license system, the conduct of the JATC has been egregious and obstinate. Twenty-one years and three appeals after Linda Eldredge first filed her action, the JATC persists in exclusionary policies. Nine years after we remanded this case to determine the appropriate remedy for "Title VII liability based on the JATC's use of the 'hunting license' system," *Eldredge IV*, 833 F.3d at 1341, the JATC is still arguing for retention of the system, albeit in mutilated form.

*Id.*, 94 F.3d at 1371, Pet., 10a.

For the last ten years the JATC has engaged in "obstinate and egregious" conduct in its fight to maintain the hunting license system. For example, despite the Ninth Circuit's crystal clear 1987 ruling that the JATC's "Title VII liability was based on its use of the 'hunting license' system. . . . " *Eldredge IV*, 833 F.2d at 1341, Pet., 28a, the JATC persisted in arguing to the district court in 1991, and then to the Ninth Circuit in 1996, that the Ninth Circuit's 1987 ruling on JATC liability was not based on its use of the hunting license.

Moreover, the JATC has seriously misrepresented the Ninth Circuit's liability ruling to this Court in its Petition. At Pet., p. 7, the JATC misstates (again) the Ninth Circuit's ruling, describing it as follows, "The Court of Appeals held that the first-job requirement had a disparate impact upon female applicants and that its use was not a business necessity." That was not the Ninth Circuit's ruling. In fact, it has never held that the first-job requirement caused the disparate impact, or that the first-job requirement was not a business necessity. The pertinent precise language from the Ninth Circuit's 1987 opinion is set forth herein at p. 2, *supra*. In its 1996 opinion, the Ninth Circuit described its 1987 liability ruling as follows:

> In *Eldredge IV*, we held that "the differential [female applicants are only half as likely as male applicants to obtain admission into the apprenticeship program] results from use of the 'hunting license' system and not from some other element of the selection process." 833 F.2d at 1338. We also held that the hunting license system is not a business necessity. *Id.* at 1340-41. Having determined that the hunting license system had an impermissible disparate impact upon female applicants, we remanded "for entry of summary judgment for the plaintiff class on the issue of Title VII liability *based on the JATC's use of the 'hunting license' system*. . . . " *Id.* at 1341 (emphasis added). We could not have been more explicit in expressing our determination that the hunting license system is the

problem, and that elimination of the hunting license system is required.

*Eldredge VI*, *supra*, 94 F.3d at 1369-70, Pet., 7a.

While Petitioner now disputes that its conduct was "egregious" and "obstinate," it clearly cannot dispute the fact that, by maintaining the discriminatory hunting license system for twenty-two years, the JATC engaged in "persistent" discrimination. Moreover, by proposing its own affirmative action remedy, Petitioner has implicitly recognized that affirmative action was necessary here "to dissipate the lingering effects of pervasive discrimination."

### B. Petitioner Has Improperly Appended As "Appendix F" A Document Which Is Not Part Of The Record Below

The Petition improperly bases its argument on a document which is not part of the record below. That document is appended as "Appendix F" to the Petition at 140a and is entitled, "Summary of Minority and Female Participation in Petitioner's Apprenticeship Program December 1995."

Petitioner argues, improperly, using what purports to be 1995 statistical data in Appendix F, that the Ninth Circuit was incorrect when it referred to the JATC's "decades-long history of recalcitrance and foot-dragging." Pet., pp. 23 and 24. Petitioner would have this Court ignore statistical data that was admitted into evidence at the 1991 remedy trial,[12] Pet., p. 23, and instead rely on data which was not offered into evidence in any court below. Pet., pp. 26-27.

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[12] The evidentiary data relied on by the Ninth Circuit showed that the admission rate of women applicants had further declined in the period 1985 through 1990 from what it had been in the period 1976 through 1984. In the earlier period women applicants' rate of admission had been 54 percent of the male applicants' rate of admission; in the period 1985 through 1990, women's admission rate had declined to 48 percent of the men's admission rate. *Eldredge VI*, 94 F.3d at 1368, Pet. 3a.

These arguments by Petitioner, based improperly on a document that is outside the record of this case, should be disregarded.

### C. The Affirmative Action Remedy Is Directed At The Conduct Of The JATC, Not At Employer Conduct

The JATC succinctly and accurately described the affirmative action order at Pet., p. 10, "The order requires no affirmative action by employers to hire more women, and does not alter the employers' collectively bargained right to reject any applicant."

The affirmative action order in this case is directed at the conduct of the JATC, not at the conduct of the employers. Pursuant to the Order, the JATC meets its obligations by referring at least one woman from each group of five applicants referred from a JATC new applicant referral list. If the JATC exhausts the women on a particular list, it faces no penalty. It simply is required to engage in recruitment efforts.

The employers herein are not obligated to hire any person referred by the JATC, male or female.

### D. The 20 Percent Female Affirmative Action Goal Is Temporary And It Is Geared To The Appropriate Labor Market

Petitioner incorrectly designates the 20 percent women's participation goal as a permanent "quota," rather than a temporary goal, and asserts that the 20 percent goal does not accurately reflect the available labor market. At the same time, Petitioner defends the district court's adoption of the JATC's own (now reversed) affirmative action remedy, under which 100 percent of qualified women applicants were indentured. The JATC's position is untenable and does not comply with existing precedent.

The 20 percent female affirmative action order operates as a goal, not a quota. The order requires, whenever feasible, that a minimum of 20 percent of the applicants referred from

a new applicant referral list be female. The JATC is not penalized if there are no women available to refer; it simply must engage in further recruitment efforts. *Eldredge*, 94 F.3d at 1370, Pet., 8a-9a. Nor is the 20 percent a lid on women's participation, as it would be if it were a quota. The special fifth affirmative action referral does not come into play if "at least one of the first four referrals results in a woman being referred. . . . " Pet., 41a.

The affirmative action referral system is temporary. As soon as 20 percent of the participants in the JATC apprenticeship program are female, the affirmative action referrals end. The purpose of the 20 percent female participation goal is not to have the JATC maintain or even obtain a particular ratio of females to males. Rather its purpose is to set " 'a benchmark against which the court [can] gauge [the JATC's] efforts to remedy past discrimination.' *Sheet Metal Workers*, 478 U.S. at 478, 106 S.Ct. at 3051." *Eldredge*, 94 F.3d at 1372, Pet., 12a.

There is no question but that the 20 percent affirmative action goal set in this case is a conservative one based on applicable precedents of this Court. In *Steelworkers v. Weber*, 443 U.S. 193, 198 (1979) this Court upheld an agreement reserving 50 percent of the openings in in-plant craft-training programs for blacks, until such time as the percentage of black skilled craftworkers in the plant approximates the percentage of blacks in the local labor force. Also, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 628 (1987), the Court recognized that for "jobs that require no special expertise" the relevant labor force is the percentage of women or minorities "in the area labor market or general population."

Petitioner misstated the evidence that supports the 20 percent goal when it asserted that the Ninth Circuit established the 20 percent affirmative action goal "with support from only one source. . . . " Pet., p. 25. In fact, there were at least three sources which supported the establishment of a 20 percent affirmative action goal herein.

One was the United States Department of Labor regulation recommending an affirmative action goal for women's

participation in apprenticeship programs, "at a rate which is not less than 50 percent of the proportion women are of the workforce in the program sponsor's labor market area. . . ." 29 C.F.R. § 30.4(f). The second source for the 20 percent goal was the affirmative action women's participation goal which had been set, specifically, for the JATC by the State of California, Division of Apprenticeship Standards; that goal was 21.51 percent. R.T. 4-66:7-20; R.T. 5-201:3-11; Pl. Trial Exhibit 17.

In addition, an expert witness on women in apprenticeship programs testified that the 20 percent goal was attainable. The expert testified that women had a very high level of interest in the carpentry apprenticeship program but that many women had been discouraged from applying for admission due to their belief that they would be unable, using the hunting license, to find the necessary first-job. This evidence was unrebutted. R.T. 4-66:22-4-67:24, 4-71:6-4-72:16.

The JATC's assertion that the appropriate goal for women's participation in an apprenticeship program should be no greater than the female utilization goal that applies to federal contractors (also set by the United States Department of Labor) is absurd. The goals pertain to different populations and they use wholly different criteria to measure female participation.

The goal for women's utilization by federal contractors is expressed as a percentage of total work hours (the female utilization goal for federal contractors is 6.9 percent of total work hours). The population from whom the total work hours derive includes both fully trained journeymen as well as apprentices.

The federal and state affirmative action goals pertaining to women's participation in apprenticeship programs are expressed as a percentage of the total number of participants in the apprenticeship program. The population includes only persons enrolled in the apprenticeship training program.

The JATC assertion that it will be permanently required to operate the 20 percent affirmative action referral plan is clearly wrong. Because women have been largely excluded from the carpentry trade, the achievement of the benchmark

20 percent goal will, no doubt, be gradual. However, according to Petitioner's Appendix F, as of 1995, it appears that women exceeded 10 percent of the total JATC carpentry apprentices in at least three California counties, and in Humboldt County they constituted 19.5 percent of the apprentices.[13] It is obvious that the JATC, gradually, will be able to achieve this conservative goal.

## CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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[13] Respondents, by this reference to Petitioner's outside of the record Appendix F, do not accede to its presence on the Petition.